Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1724

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Ccurt
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

H. Albert Nance, Jr.
Counsel of Record
Henrico Commonwealth's
Attorney's Office
P. O. Box 27032
Richmond, Virginia 23273

Counsel for Appellee

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Was there a substantial federal
estion raised by Appellants in the State
urts which is worthy of consideration?

a. Was the question of whether
rginia Code Sections 22.1-254 and 22.1-257,
aling with compulsory school attendance,
e violative of the First and Fourteenth
endments to the United States Constitution
plicitly considered by the Virginia Supreme
urt in denying the petition for appeal?

b. Was the decision of the Vir-
nia Supreme Court based solely on questions
fact as determined by the Circuit Court of
e County of Henrico?

c. In light of the fact that for-
r Virginia Code Sections 22.1-254 and 22.1-
4 track the language used by the United
ates Supreme Court in Wisconsin v. Yoder,

406 U.S. 205 (1972), and that other cases, such as Rivinius v. North Dakota, 328 N.W. 2d 220 (1982), cert. denied 103 S. Ct. 1525 (April 4, 1983), have presented similar questions, is there a substantial question given the broad discretion of the legislature and the alternatives provided within the statutory provisions?

d. Are the issues presented by Appellants moot since Virginia Code Section 22.1-254, dealing with compulsory school attendance, was amended by the Virginia General Assembly in July of 1984, and at the same time altered by the addition of Virginia Code Section 22.1-254.1?

TABLE OF CONTENTS

Question Presented. . . . . .i, ii

Proceedings Below 2, 3

Jurisdiction. 3, 4

Statutes Involved 4, 5, 6, 7

. . . . . 8, 9, 10

Statement 11, 12, 13, 14

. . . . .15, 16, 17, 18

Federal Question. . . .18, 19, 20, 21, 22

. . . .23, 24, 25, 26, 27

Conclusion. 27

TABLE OF AUTHORITIES

CASES

Grigg v. Commonwealth, 224 Va. 356 (1982) 27

Rivinius v. North Dakota, 328 N.W. 2d 220 (1982), cert. denied 103 S. Ct. 1525 (April 4, 1983) . . . . . .ii, 22, 24

Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . . . i, 22, 24

STATUTES

28 United States Code Section 1257 (2) 19

Virginia Code Section 18.2-11. 6

Virginia Code Section 22.1-254 i, ii, 2, ...4, 6, 7 , 8, 10, ...11, 13, 18, 22, 24, 25, 26

Virginia Code Section 22.1-254.1 . .ii, 8, ... 26

CASES

Virginia Code Section 22.1-255 6

Virginia Code Section 22.1-257 . i, 5, 10,

. . . . . 12, 13, 18,

. . . . . .22, 24, 25

Virginia Code Section 22.1-263. 6

NO. 84-1724

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Virginia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

PROCEEDINGS BELOW

Appellants were charged with violating Virginia Code Section 22.1-254, in that they failed to comply with that section by teaching their children at home between August 30, 1982 and February 28, 1983. Appellants were found guilty as charged in the Juvenile and Domestic Relations District Court of the County of Henrico, the Order of such convictions being dated April 15, 1983.

The Circuit Court of the County of Henrico considered their appeal, and on October 27, 1983 found Appellants guilty of violating Virginia Code Section 22.1-254, but continued the case for final disposition until December 12, 1983, at which time the costs of court were assessed against Appellants and they were ordered to comply with Virginia Code Section 22.1-254.

The Supreme Court of Virginia, after a review of the record and consideration of the arguments submitted, found no reversible error in the judgments of the Henrico County Circuit Court and refused Appellants' petition for appeal in an Order dated November 21, 1984. On consideration of Appellants' petition for rehearing the Supreme Court of Virginia denied such petition in an order dated January 18, 1985.

The Commonwealth of Virginia was first made aware of Appellants' appeal to the United States Supreme Court by receipt of the jurisdictional statement on May 6, 1985.

JURISDICTION

Appellants allege jurisdiction based on the refusal by the Virginia Supreme Court of their petition for appeal and subsequent petition for rehearing from the judgment of

the Henrico County Circuit Court, which became final as a result of the action of the Virginia Supreme Court. This judgment found Appellants guilty of violating Virginia Code Section 22.1-254.

STATUTES INVOLVED

Virginia Code Section 22.1-254, as it read prior to July 1, 1984, states as follows:

> Ages of children required to attend.--Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before October thirty-first of the 1980-1981 school year and September thirtieth of any school year thereafter and who has not passed the seventeenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent.

Virginia Code Section 22.1-257 reads as follows:

> Excusing children who cannot benefit from education or whose parents conscientiously object; excusing children for reasons of health or apprehension for personal safety.--
>
> A. A school board:
>
> 1. May, on recommendation of the principal and the division superintendent, with the written consent of the parent or guardian, excuse from attendance at school any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school;
>
> 2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school;
>
> 3. Shall, on the recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school for such period of time as the court deems appropriate any pupil who, together with his parents, is opposed to attendance at a school by reason of concern for such pupil's health, as verified by competent medical evidence, or by reason of such pupil's reasonable apprehension for personal safety when such concern or apprehension in that pupil's specific case is determined by the court to be justified;

4. May, on recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school any pupil who, in the judgment of such court, cannot benefit from education at such school.

B. The court in reaching its determination as to whether the concern or apprehension referred to in paragraph A3 of this section is justified shall take into consideration the recommendation of the principal and division superintendent.

C. As used in paragraph A2 of this section, the term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code.

Virginia Code Section 22.1-263 reads as follows:

Violation constitutes misdemeanor.-- Any person violating the provisions of Section 22.1-254 or 22.1-255 shall be guilty of a Class 4 misdemeanor.

Virginia Code Section 18.2-11 reads as follows:

Punishment for conviction of misdemeanor.-- The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $1,000, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than $500, either or both.

(c) For Class 3 misdemeanors, a fine of not more than $500.

(d) For Class 4 misdemeanors, a fine of not more than $100.

Virginia Code Section 22.1-254, which became effective July 1, 1984, reads as follows:

> Ages of children required to attend.--Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before October 31 of the 1980-1981 school year and September 30 of any school year thereafter and who has not passed the seventeenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home

> instruction of such child as described in Section 22.1-254.1. Instruction in the home of a child or children by the parent, guardian or other person having control or charge of such child or children shall not be classified or defined as a private, denominational or parochial school.

Virginia Code Section 22.1-254, which also became effective July 1, 1984, reads as follows:

> Declaration of policy; requirements for home instruction of children.--
> A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the seventeenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Board of Education; or (iv)

provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.

B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction as required by paragraph A of this section. The division superintendent shall notify the Superintendent of Public Instruction of the persons approved to provide home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation

or assessment which, in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this paragraph is not provided by the parent, home instruction shall cease and the parent shall make other arrangements for the education of the child which comply with Section 22.1-254 of the Code of Virginia.

D. For purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to Section 22.1-257 of this Code.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be borne by the party appealing.

STATEMENT

Richard A. Snider and Margaret Q. Snider, who claim to be members of the traditional Catholic faith, Mrs. Snider having joined the Pius X Movement in 1977 and Mr. Snider having joined in April of 1983, have two children, Dominique, age 10, and Aaron, age 12. Mr. and Mrs. Snider placed their children in Hanover Academy, a private school, in 1981 and 1982; however, Mrs. Snider began teaching the children at home at the beginning of the 1982-83 school year without approval of the School Board under the guidelines of a home correspondence course. They were subsequently charged with violating Virginia Code Section 22.1-254.

Virginia Code Section 22.1-254 required parents to send their school age children to a public, private, denominational or parochial school or have such children

taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent. In conjunction, Virginia Code Section 22.1-257 provides that a school board shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school; that section provides that the term bona fide religious training or belief does not include essentially political, sociological, or philosophical views or a merely personal moral code. Mr. and Mrs. Snider contended that their children should be excused under Virginia Code Section 22.1-257 from attending school based upon their religion and that Mrs. Snider should be allowed to instruct them at home with the correspondance course materials. However, the school board

did not excuse the Snider children under Virginia Code Section 22.1-257 as they determined that Mr. and Mrs. Snider did not have bona fide religious beliefs that would prevent them from complying with some portion of Virginia Code Section 22.1-254. In fact, the school board attempted to aid Mrs. Snider in becoming qualified to teach her children at home.

During the trial in the Henrico County Circuit Court, Father Ronald J. Ringrose, who was offered as an expert in the traditional Catholic faith, testified on behalf of the Sniders. On cross-examination, he admitted that there had been no real change in the Catholic beliefs from 33 to 1962 and that prior to 1962, there were no tenets within the Catholic church that would have forced parents not to send their children to school. In fact, he testified that

most Catholic parents sent their children to either a public, private or parochial school. Father Ringrose further admitted that the Catholic faith had never and still does not say a child cannot be educated in either a public, private, or parochial school and that prior to 1962, there was little resistance by parents to children attending school. In regard to the Sniders, Father Ringrose testified that they had arrived at their convictions regarding school based upon their beliefs as to what occasions of sin they could reasonably expose their children to, and further admitted that other members of the traditional Catholic movement do send their children to public, private, or parochial schools and are obeying their convictions and the tenets of their faith in so doing. He further admitted that one alternative for

the Sniders would be to have their children taught at home by someone other than their mother or father who was approved by the school board.

Mrs. Snider testified that she became a traditional Catholic in 1977 although she had been a member of the Catholic faith all her life and had been educated in the Catholic schools rather than at home. She also admitted that her children were attending Hanover Academy in 1981 and 1982 and that she was not aware of the Encyclicals of her faith regarding education when she allowed them to attend such a school. She also agreed that they were withdrawn partially because of financial reasons. Regarding her faith, she stated that she and her husband decided what was right or wrong for their children and what occasions of sin they would allow them to be exposed to, this decision being a subjective

one that they arrived at personally. Mrs. Snider admittedly makes concessions regarding what occasions of sin her children are exposed to and agreed that other members of her faith send their children to some type of school. She stated, however, that she would cooperate with the civil authorities until it became immoral, a standard that she would decide upon, and that she was not answerable to the State or the Courts regarding her children's education.

Mr. Snider testified that he became a member of the Traditional Catholic faith in April of 1983, subsequent to the offense date in this case, but had acquired many of the beliefs from his wife prior to their decision to keep the children at home. He further stated that he was raised in the Protestant faith, attended public schools,

and that the choice of how his children are educated is left with him and his wife.

Clearly, there was no evidence presented that the Catholic faith, either traditional or modern, prohibits the Snider children from attending either a public, private or parochial school, or from being taught in the home by an approved tutor. Since there are other members of her faith who send their children to some kind of school and are not sinning in the eyes of the church and, because she makes the decisions as to what activities the children will be allowed to be involved in, Mrs. Snider's beliefs, while sincere, are philosophical and moral rather than rooted in religion. Having heard all the testimony, the trial court decided, as a matter of fact, that the Sniders' religious beliefs

were not rooted in the Catholic theology, but constituted philosophical views that differed from other members of their faith.

FEDERAL QUESTION

Was there a substantial Federal question raised by Appellants in the State courts which is worthy of consideration?

a. Was the question of whether Virginia Code Sections 22.1-254 and 22.1-257, dealing with compulsory school attendance, are violative of the First and Fourteenth Amendments to the United States Constitution explicitly considered by the Virginia Supreme Court in denying the petition for appeal?

Where the highest state court assumes or holds that a federal question is properly before it and then considers and disposes of that issue, a federal question can be said to have been raised in state court. In cases where a record of the state's highest court decision exists, this determination is easily made; however, in a case such as

this, where the Virginia Supreme Court merely recites in the opinion that, "upon review of the record in this case and consideration to the granting of an appeal, the Court is of opinion there is no reversible error in the judgments complained of," this determination cannot be made. Therefore, it cannot be said that the Virginia Supreme Court, in response to Appellants' petition before that court, explicitly decided any federal question. Absent such a determination, it is respectfully submitted that the Supreme Court of the United States is without jurisdiction under 28 U.S.C. Section 1257(2).

b. Was the decision of the Virginia Supreme Court based solely on questions of fact as determined by the Circuit Court of the County of Henrico?

Clearly, there was a factual determination made by the Circuit Court of the County of Henrico regarding the nature and

sincerity of Appellants' beliefs regarding the education of their children, this being a threshold question to any constitutional issue. The fact finder concluded that Appellants' beliefs, while sincere, were not based on their religion, but were merely philosophical and personal differences occurring within the Catholic faith and even within the Pius X movement of which the Sniders were members. In view of all the testimony it was determined as a matter of fact that the Sniders decided what was right or wrong for their children based on their subjective personal standards and that neither the modern or traditional Catholic faith mandates non-attendance of children in public, private or parochial schools. Furthermore, it was established that Appellants were not violating the tenets of their faith by complying with the Virginia statute

and that other members of their movement did comply by sending their children to school or having them taught by an approved tutor, thus pointing to the different philosophical views within the religious movement espoused by the Sniders. It was not established factually that there were other members of the Sniders' sect who held the same beliefs regarding the education of their children.

Assuming the Virginia Supreme Court accepted these findings of fact, which by case law, unless plainly wrong, would have to be accepted, this case could have been decided without considering any federal questions. If the beliefs of the Sniders regarding the Virginia compulsory school attendance statutes were not based on religion, then there were no constitutional questions to be decided.

The Supreme Court of the United States should not examine the state court's conclusions of fact, since the decision could have been based wholly on these determinations and not on federal constitutional grounds.

c. In view of the fact that former Virginia Code Sections 22.1-254 and 22.1-257 track the language used by the United States Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), and that other cases, such as Rivinius v. North Dakota, 328 N.W. 2d 220 (1982); cert. denied 103 S. Ct. 1525 (April 4, 1983), have presented similar questions, is there a substantial federal question given the broad discretion of the legislature and the alternative provided within the statutory provisions?

In the landmark case of Wisconsin v. Yoder, 406 U.S. 205 (1972), the United States Supreme Court announced the standards by which cases involving compulsory school attendance laws would be judged. This Court found that, "there is no doubt

as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." While deciding that the Amish had made, "a convincing showing, one that probably few other religious groups or sects could make, "this Court went on to state that,

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief . . . [t]hus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the Religion Clauses.

Using similar language, former Virginia Code Sections 22.1-254 and 22.1-257 carved out exemptions which provided for legitimate and sincere religious beliefs, and, in addition, provided alternative methods by which its citizens could comply with the law. These alternatives and exemptions seemed to follow the language used in Yoder (Virginia Code Section 22.1-257(A)(2) and 22.1-257(c)) and provided a built-in balancing process in the statute by which the aims of state education and the proper exercise of first amendment free exercise rights could be met.

In the wake of Yoder, other cases have been considered, but the threshold question continues to be the sincerity and theological basis of belief asserted by the parents. In Rivinius v. North Dakota, 328 N.W. 2d 220 (1982), cert. denied 103 S. Ct. 1525 (April 4, 1983), it was

pointed out that, "a showing of a sincerely held religious belief is necessary to prevent a limitless excuse for avoiding all unwanted legal obligations and a group's word cannot automatically be accepted if a religious exemption is at issue."

The legislature of Virginia considered these factors in enacting former Virginia Code Sections 22.1-254 and 22.1-257, and because of the language used in the statutes and the balancing process which was built in, the broad discretion which state legislatures have should not be questioned absent the convincing showing of a valid claim concerning the constitutionality of these statutes.

d. Are the issues presented by Appellants moot since Virginia Code Section 22.1-254, dealing with compulsory school attendance, was amended by the Virginia

General Assembly in July of 1984, and at the same time altered by the addition of Virginia Code Section 22.1-254.1?

Effective July 1, 1984, the Virginia General Assembly amended Virginia Code Section 22.1-254 and added 22.1-254.1, in an attempt to refine its provisions regarding home instruction. While these changes did not alter the nature of the provision, they did provide additional guidelines for the approval of home instruction. These changes brought Virginia's compulsory attendance law even further in line with accepted federal constitutional standards. These changes tend to make Appellants' claims moot, especially in regard to any equal protection argument, since the legislature chose to further delineate the provisions of Virginia Code Section 22.1-254 in spite of

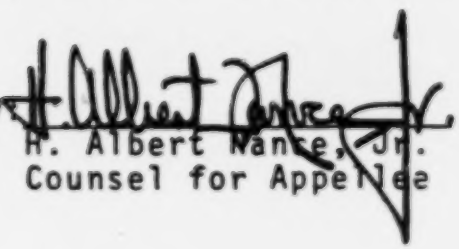
the favorable holding in Grigg v. Commonwealth, 224 Va. 356 (1982).

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Virginia.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By 

H. Albert Nance, Jr.
Counsel for Appellee

H. Albert Nance, Jr.
Counsel of Record
Henrico Commonwealth's
Attorney's Office
P. O. Box 27032
Richmond, Virginia 23273

Counsel for Appellee